No. 14546

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OTTO K. OLESEN, individually and as Postmaster of the City of Los Angeles, State of California,

Appellant,

vs.

V. E. STANARD, individually and doing business under the firm name and style of MALE MERCHANDISE MART,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Introduction.

This appeal relates generally to the postal obscenity law and to the extent of the power of the Postmaster General to restrict mail addressed to persons who have violated this law. The two specific questions to be decided are as follows:

1. Whether or not the Postmaster General has the authority to impound, or hold in *status quo*, mail addressed to a person who he believes is violating the postal obscenity law, until such time as an administrative hearing can be had and an administrative order made.

2. Whether or not the Appellee's advertising circular constitute substantial, or any, evidence of the fact that the matter advertised therein is obscene.

Statement of Jurisdiction.

The District Court had jurisdiction by virtue of 5 U. S. C. A. 1009(c) and 28 U. S. C. A. 1339. The jurisdiction of this Court is based on 28 U. S. C. A. 1292(1).

Statement of the Case.

The Appellee, V. E. Stanard, is engaged in the business of distributing and selling through the mail certain publications and novelties under the firm name of Male Merchandise Mart. The general procedure followed by the Appellee is to send out illustrated advertising circulars to prospective purchasers, inviting orders for the materials advertised in the circulars.

The Post Office Department, through its inspectors, uses "test" names, which eventually become included on mailing lists which are used by mail order operators such as the Appellee. It is in this fashion that the Postmaster General obtains these adverising circulars, though many are sent to him by interested members of the public who have also received them.

After receiving some of the Appellee's advertising circulars, the following developments have taken place in this case:

March 1, 1954— The Postmaster General examined the Appellee's advertising circulars and determined that they constituted evidence satisfactory to him that the Appellee was depositing or was causing to be deposited in the United States mails information as to where, how and from whom obscene, lewd, lascivious, indecent, filthy and vile articles, matter,

things, devices, and substances may be obtained. As a result, the Postmaster General made an order instructing the Postmaster at Los Angeles to impound all mail addressed to the Appellee pending a hearing and final administrative decision. On the same date the Appellee was given notice that a hearing would be held on March 17, 1954.

March 10, 1954— The Appellee filed a Complaint in the District Court (Stanard v. Olesen, 16522-HW) wherein the Appellee prayed for an Injunction and declaration of invalidity of the Impound Order.

An Order to Show Cause was issued on that date to be heard March 25, 1954.

April 1, 1954— The District Court filed a Memorandum wherein it was indicated that the Impound Order was valid, but that it could not be reviewed in the District Court at that time, because administrative remedies would not be exhausted until there had been a final determination by the Post Office Department, and that the District Court therefore did not have jurisdiction.

April 12, 1954— Appellee filed a Notice of Appeal from the District Court's Memorandum and made a motion in this Court for relief from the Impound Order.

April 13, 1954— Judgment of Dismissal was entered in the District Court.

April 30, 1954— The initial decision of the Post Office Hearing Examiner was entered and appealed from in the administrative proceedings by Appellee.

May 7, 1954— This Court decided to hold Appellee's motion in abeyance for ninety days from March 17, 1954 (the date of the administrative hearing) to give the Post Office Department to and including June 15, 1954, within which to make and enter a final and judicially reviewable order or determination. Thereafter Appellee applied to Justice Douglas as Circuit Justice for relief from the Impound Order.

May 22, 1954— Justice Douglas denied relief on the ground that Appellee should seek judicial review according to the orderly procedure which she was already following.

June 11, 1954— The Post Office Department made and entered a final and judicially reviewable order instructing the Postmaster at Los Angeles to return all of Appellee's mail to the senders thereof.

June 22, 1954— Appellee filed a Complaint in the District Court (Stanard v. Olesen, No. 16866-PH) wherein Appellee prayed for an Injunction and declaration of

invalidity of both the Impound Order of March 1, 1954, and the Final Order of June 11, 1954. [T. R. 3-10.] An Order to Show Cause was issued to be heard June 28, 1954. [T. R. 20-21.]

June 28, 1954— The Order to Show Cause was continued to July 12, 1954. [T. R. 22-24.]

July 12, 1954— The Order to Show Cause was heard by the District Court.

July 16, 1954— This Court made an Order requiring the Appellee to show cause why the appeal taken by her on April 12, 1954 should not be dismissed because moot.

July 27, 1954— The Appellee filed in this court a consent to the dismissal of her appeal as moot. [T. R. 54.]

August 4, 1954— The District Court made an Order for Judgment for Appellee. [T. R. 57-58.]

August 13, 1954— The District Court made the Findings, Conclusions and Judgment for Preliminary Injunction which are the subject of this appeal. [T. R. 58-66.]

Statutes Involved.

The pertinent statute is: 39 U. S. C. A. 259(a), which provides as follows:

"Exclusion from Mails of Obscene, Lewd, etc., Articles, Matters, Devices, Things or Substances:

"Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company,

partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for an obscene, lewd, lascivious, indecedent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

"(a) Instruct Postmasters at any post office at which registered letters or any other latters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the Postmaster at the office at which it was originally mailed, with the word 'unlawful' plainly witten or stamped upon the outside thereof, and all such mail matter so returned to such Postmasters shall be by them returned to the senders thereof, under such regulations as the postmaster General may prescribe; and . . ."

Summary of Argument.

The District Court Judgment for Preliminary Injunction should be reversed for the following reasons:

1. The Postmaster General had and has authority to issue the Impound Order.
2. The Final Order of the Postmaster General is supported by substantial evidence.

ARGUMENT.

I.

The Postmaster General Had and Has Authority to Issue the Impound Order.

The Postmaster General has authority, by virtue of 39 U. S. C. A. 259(a) to withhold delivery of mail to a person whenever it appears from evidence satisfactory to him that the mails are being used by that person in connection with obscene matter, either by sending obscene matter itself through the mail or by sending information as to where, how or from whom the same may be obtained.

That the Postmaster General may withhold mail prior to the holding of a hearing, prior to the conclusion thereof, and prior to the issuance of a final type order directing the return of the mail to the senders thereof, is not set forth in the statute in so many words, but the Courts have seen fit to imply this power in order to give effect to the statute.

The question has never been decided by an Appellate Court, but there are several District Court decisions holding that the Postmaster General may order the impounding of mail prior to hearing.

In *Peoples United States Bank v. Gilson* (E. D. Mo., 1905), 140 Fed. 1, the Postmaster General had issued a fraud order stopping the plaintiff's mail on the basis of reports of Postal Inspectors. The plaintiff sought an injunction on the ground that the evidence was deficient. The Court denied the injunction, pointing out that the

reports of the inspectors are entitled to great weight, and said at page 7:

> "The reports are, of necessity, evidence on which he will act. They make the reports, and their reports, in the language of the statute, was evidence satisfactory to him, the Postmaster General, that the bank was engaged in a scheme to defraud. Then, and thereupon, the Postmaster General could have issued the 'fraud order.' "

Wallace v. Fanning (S. D. Cal., 1953), unreported, No. 15499-T, is squarely in point. There, the plaintiff sought to enjoin the Postmaster at Los Angeles from impounding mail prior to hearing. Judge Yankwich, who heard the case during Judge Tolin's illness, denied the injunction and stated in his conclusions of law:

> "That under the powers given by Sections 255 and 259(a), Title 39, U. S. C., the Postmaster General had a reasonable time while instituting administrative proceedings and holding a hearing on the evidence, to impound the mail addressed to W. A. Lee at the address mentioned."

See also Appendix to this Brief for unreported District Court Opinions in *Pink Williams, also known as "Cowboy" Pink Williams v. Petty* (E. D. Okla., 1954), and *Barel v. Fiske* (S. D. N. Y., 1954).

But aside from these cases, there are cogent reasons for imposing upon the Postmaster General the duty as well as the power to impound mail prior to hearing in order to protect the public interest in keeping obscene matter out of the mails.

Congress, in granting to the Postmaster General the power to impound mail prior to administrative hearing under 39 U. S. C. A. 259(a), and the Courts, in upholding this power, have undoubtedly had in mind the obvious necessity of doing so, because of the possibility that so-called "fly-by-night" mail order operators might evade the law effectively if they could receive their mail pending an administrative hearing and final determination thereof. Certainly, Congress and the Courts must have visualized the situation whereby a person assumes a fictitious name, sends out circulars inviting mail orders at a given address, and then receives these orders all within a period of a few months. If the Post Office could not impound those mail orders, they would all be received and filled before the administrative proceedings could be completed. At that point, the mail order operator would be completely indifferent to whatever result may be reached at the administrative hearing. He need only resume operations with a new name and address.

That the Appellee has operated her business in this fashion for some years is apparent from the affidavit of an assistant Solicitor of the Post Office Department. [T. R. 41-48.] It is further shown by the affidavit of a Post Office Inspector that the final order of the Post Master General made in this case would have been almost totally ineffective had it not been for the prior impound order, inasmuch as approximately 98% of the mail addressed to Appellee was received by the Post Master at Los Angeles prior to the time of making the final order. [T. R. 49-53.] These affidavits were attached as exhibits to Appellant's reply to the Order to Show Cause and were filed with the District Court.

II.

The Order of the Postmaster General Is Supported by Substantial Evidence.

It is elementary that obscenity is a factual question and therefore committed to the discretion of the Post Office Department.

United States v. Dennett, 39 F. 2d 564 (2d Cir., 1930);

United States v. Levine, 83 F. 2d 156 (2d Cir., 1936);

United States v. Two Obscene Books, 99 F. Supp. 760 (N. D. Cal., 1951).

The proposition is also well established that questions of fact, when decided by an administrative agency, must be affirmed by the District Court when supported by substantial evidence.

National Conference On Legalizing Lotteries v. Farley, 96 F. 2d 861 (C. A. D. C., 1938);

Farley v. Heininger, 105 F. 2d 79 (C. A. D. C., 1939).

The Appellee's advertising circulars were attached as exhibits to the initial decision of the Post Office Hearing Examiner [T. R. 11-19] which was attached as an exhibit to the Appellee's Complaint and to the Appellant's written reply to the Order to Show Cause filed in the District Court. It is not contended by Appellant that the circulars themselves are obscene, but it is submitted that they constitute substantial evidence that the Appellee was and is using the mails to disseminate information as to where, how, and from whom obscene, lewd, lascivious, in-

decent, filthy and vile articles, matter, things, devices and substances may be obtained.

The decision of the District Court, however, goes further than to hold that there is no substantial evidence, and holds that the advertising circulars are no evidence of the nature of the things they describe, and that the advertising circulars are therefore no evidence of the fact that they give information as to where, how, or from whom obscene material may be obtained. It is true that at the time the Postmaster General made the order in question he had not obtained nor seen any of the things which the Appellee was offering for sale. He had, however, examined the Appellee's advertising circulars in which the Appellee has aptly and artfully described her wares. Therein the Appellee offers to send to the reader of the circular any number of hundreds of books and pictures, all of which deal with the subject of sex, and each of which is promised to give the recipient thereof a "thrill."

We are thus faced with what appears to be a rather novel situation in that it does not seem to have been presented to the Courts, or at least is not the subject of any reported decision. There are, however, many related cases which may be of assistance to the Court in deciding the question.

First, it is important to bear in mind that the act complained of here is not the actual sending of obscene material through the mail, but rather the sending of information as to where, how, or from whom the same may be obtained. 39 U. S. C. A. 259(a), under which the Postmaster General acted here, is a relatively new statute and the Courts have had little opportunity to construe it. It is patterned, however, after 18 U. S. C. A. 146, which

has been in effect for many years and has been interpreted on many occasions. In respect to the latter criminal statute, it appears to be well established that an offense is complete upon the mailing of information as to where, how or from whom the obscene material can be obtained.

Grimm v. United States, 156 U. S. 604, 39 L. Ed. 550, 15 S. Ct. 470 (1895);

DeGignac v. United States, 113 Fed. 197 (7th Cir., 1902).

In those cases, of course, the only question before the Court was the sufficiency of an Indictment based on this portion of the statute. The information which had been sent through the mails was not in itself obscene and did not show on its face that the material it referred to would be obscene. To sustain a prosecution, then, it would be necessary for the Government to prove at the trial that the material, as to which information was given, was in fact obscene.

The case at bar is quite different, however. Here the Appellee has not merely mailed an innocuous letter indicating simply, where, how or from whom books and pictures can be obtained. In this case she has gone to great lengths to describe the materials. Her descriptions of the materials are evidence of the nature of the materials and are substantial evidence of the fact that these materials are obscene.

See also, the following cases in which advertising circulars somewhat similar to those involved in the instant case were held to be obscene in and of themselves:

Burstein v. United States, 178 F. 2d 665 (9th Cir., 1950);

O'Neil v. United States, 56 F. 2d 51 (71 Cir., 1932).

There is still another line of cases which may be of assistance to the Court here. These relate to a different portion of the same criminal statute referred to above (18 U. S. C. A. 1461) and to another criminal statute regarding the postal laws (18 U. S. C. A. 876). These statutes make it a crime to send through the mail a letter attempting to extort money or giving information as to where, how or from whom a device may be obtained which will be used to prevent conception.

Gilbert v. United States, 182 F. 2d 316 (5th Cir., 1950);

United States v. Pignatelli, 125 F. 2d 643 (2d Cir., 1942);

Ackley v. United States, 200 Fed. 217 (8th Cir., 1912;

Bates v. United States, 10 F. 2d 92 (C. C. A. Ill., 1881).

In these cases the offense is complete upon the mailing of the letter which makes the threat or gives the information as to the obtaining of the device. It is immaterial that the defendant may not intend or may not be able to carry out the threat. Similarly, it is no defense to show that the device will not in fact prevent conception. In these cases the Courts have taken the view that when a person has mailed something which states that he will do something to extort money, or that he will make available a device to prevent conception, then he is bound by his statement.

In the instant case, it would seem that the Appellee has placed herself in the same position. By vividly describing in her advertising circulars the materials which she offers for sale, she has, in the words of the statute, sent through the mails information as to where, how, and from whom obscene, lewd, lascivious, indecedent, filthy, and vile articles, matter, things, devices, and substances may be obtained.

But perhaps the question can be examined in still another manner. Looking again to 18 U. S. C. A. 1461, we find that the term "indecent" (which in that statute is included in the definition of obscenity) includes "matter of a character *tending* to incite arson, murder, or assassination." (Emphasis supplied.) What would be the situation if one person were to send through the mail a letter to another stating that he had a plan to commit arson, murder, or assassination and urging that they confer for the purpose of carrying it out? Such a communication would clearly seem to be within the prohibition of the statute. How then does this differ from the situation wherein a person sends through the mail a circular stating that he has obscene matter which he will make available? The tendency to the unlawful purpose would seem to be the same in either stiuation.

Conclusion.

The decision of the District Court should be reversed on both grounds:

1. The Postmaster General had and has authority to issue the impound order.

2. The final order of the Postmaster General is supported by substantial evidence.

Respectfully submitted,

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APPENDIX.

In the United States District Court for the Eastern District of Oklahoma.

Pink Williams, also known as "Cowboy" Pink Williams, Plaintiff, v. Carl Petty, Postmaster, Caddo, Oklahoma, Defendant. No. 3655-Civil.

Filed Jan. 7, 1954.

Memorandum.

Plaintiff seeks an order temporarily restraining defendant, as Postmaster at Caddo, Oklahoma, from "continued impounding mail addressed to Box 157, Caddo, Oklahoma * * * until further order of this Court, and for an order directing defendant to release all of plaintiff's mail * * *." The relief sought is against the defendant as postmaster. Plaintiff, without alleging any facts out of which this controversy arose, alleges that the postmaster's act "in impounding plaintiff's mail is arbitrary, capricious, unlawful, wrongful, and in strict violation of plaintiff's constitutional rights."

A hearing on plaintiff's application was set for December 30, 1953, at which time Honorable Frank D. McSherry, United States Attorney for the Eastern District of Oklahoma, acting by direction of the Attorney General of the United States, filed on behalf of the defendant postmaster a Motion to Dismiss, or, in the alternative, for Summary Judgment. In support of said motion there was attached certified copies of pleadings in a certain proceeding pending in the Post Office Department on a complaint filed by the Solicitor of the Department seeking a postal fraud order against the plaintiff. The complaint filed by the Solicitor of the Post Office Department alleged

that Pink Williams, Caddo, Oklahoma, used a fictitious, false or assumed name "Cowboy" at Caddo, Oklahoma, and charged him with a violation of 39 United States Code, Sections 255 and 259(a), and of 18 United States Code, Sections 1342 and 1361.

In the complaint filed by the Solicitor it was alleged that there was probable cause to believe that Pink Williams, Caddo, Oklahoma, was using a fictitious, false or assumed name "Cowboy" at Caddo, Oklahoma, in conducting and carry on, by means of the United States Mails, a scheme for obtaining and attempting to obtain remittances of money for a certain printed card of a filthy nature concerning a fictitious "cattlemen's Convention," and that he was disposing of, or causing to be disposed of, in the mails information as to where, how and from whom the said card might be obtained.

On November 17, 1953, Acting Postmaster General issued an order directing the Postmaster at Caddo, Oklahoma, to "refuse to deliver such mail to the party claiming same until his identity and the character of business conducted thereunder is satisfactorily established upon evidence which will be received at a hearing to be held in the Post Office Department upon such date as shall be fixed by the Chief Hearing Examiner, and such mail shall be held in your custody until my further order."

Plaintiff appeared in the proceedings mentioned above and filed an answer to the complaint of the Solicitor.

Accompanying the Motion to Dismiss is the affidavit of James C. Haynes, Jr., Chief Hearing Examiner of the Post Office Department, from which it appears that a hearing was held on the charges on December 3, 1953. That at the conclusion of the hearing Mr. Williams,

through his counsel requested and was granted until December 28, 1953, to file a brief. That counsel's attention was called to the fact that his client's mail would be impounded pending the decision and that "he made an expression of assent thereto."

Under the rules of practice of the Post Office Department, and the provisions of the Administrative Procedure Act, 5 U. S. C. 1009, an appeal from the decision of the Hearing Officer may be taken to the Postmaster General.

Plaintiff's complaint was filed in this Court on December 9, 1953. Whether or not be has filed a brief in the proceedings being conducted in the Post Office Department was not disclosed at the time of the hearing. But it does appear that the question is still pending before the Post Office Department.

Plaintiff's counsel, when the Motion to Dismiss, or, in the alternative, for Summary Judgment was filed, elected to proceed and present the question without filing any response to the affidavit in support of the motion; consequently, all facts alleged in support of the motion are accepted as true.

Defendant contends primarily that until the administrative proceedings pending in the Post Office Department are finally concluded, this Court has no jurisdiction, and that the Postmaster General is an indispensable party to this proceeding.

The Administrative Procedure Act provides for judicial review of any agency action, as well as the scope of the review. Courts generally hold that only final action is reviewable and that before resort to judicial relief may be had the administrative relief must have been exhausted. Citing Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41; McCauley v. Waterman Steamship Corp., 327 U. S.

540; Federal Power Commission v. Arkansas Power & Light Co., 330 U. S. 802; Mallory Coal v. National Bituminous Coal Commission, 99 F. 2d 399-408.

Plaintiff's contention, as I understand it, is that the Postmaster General has no authority under 39 U. S. C. A. 259-259(a) to impound mail pending a hearing on a complaint seeking a postal fraud order, but that he is authorized only upon issuance of a fraud order to "instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, partnership or association to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe."

Actually, plaintiff's attack is upon the order of the Postmaster General directing the Postmaster at Caddo to impound plaintiff's mail, and his effort is to enjoin the local postmaster from obeying the order of the Postmaster General, and requesting that this Court order him to deliver the mail contrary to the order of the Postmaster General. The contention is based on the proposition that before a postmaster may withhold mail addressed to an individual he must have some statutory authority for his act, and, unless there is such authority, his act is without authority of law and therefore invalid. To a great extent he relies upon the case of Donnell Manufacturing Co. v. Wyman, Postmaster at St. Louis (Circuit Court Eastern

District of Missouri), decided in 1907, and reported in 156 Fed. Rep. at page 415. Therein the Court held that the postmaster could not withhold mail for a period of six weeks, but the Court stated therein that "this Court does not now hold that the Postmaster General cannot make all needful orders pending the hearing and in furtherance of the hearing," referring to a hearing on a proposed fraud order. The decision seemed to turn upon the conception that there had been unreasonable delay in concluding the hearing. The Government called attention to an unreported case from the Southern District of California, Central Division, Lee A. Wallace a/k/a W. A. Lee v. Fanning, in which Judge Leon R. Yankwich held that "the Postmaster General had a reasonable time, while instituting administrative proceedings and holding a hearing on the evidence, to impound the mail addressed to W. A. Lee * * *." While it is true that the Act of Congress in question does not specifically say that the Postmaster General may, pending a hearing on a proposed fraud order, instruct the local postmaster to impound the mail, it is my judgment that the authority to impound mail pending a hearing is implicit in the authority of the Postmaster General to direct that the mail be returned to the original sender after a fraud order is issued.

Congress has placed the responsibility for protecting the mails upon the Postmaster General. It would certainly greatly hinder and handicap him in the administration of his duties in that regard to hold that he cannot, pending a hearing on whether or not a fraud order should issue, direct the local postmaster to withhold mail which is the subject-matter of the investigation. This Court is not now concerned with the merits of the controversy between the plaintiff and the Post Office Department. The

truth is that the facts giving rise to the controversy are not disclosed by the pleadings in the action, nor were they discussed by either party in presenting the motion now under consideration. It is not the purpose of the Court to express or intimate any opinion as to the merits of the controversy between the plaintiff and the Postmaster General.

If, as a result of the hearing in the Post Office Department, no fraud order issues, it necessarily follows that the plaintiff's mail will be delivered to him. In the event a fraud order issues and, subsequently, an appeal is approved by the Postmaster General, the plaintiff may than resort to the courts for relief, not only as to the issuance of the fraud order, but may seek relief from the order impounding the mail pending the issuance of the order.

In this case there has been no unreasonable delay. The proceedings were filed in the Post Office Department on November 16, or 17, 1953, and a hearing was granted plaintiff on December 3, 1953. The delay in the administrative proceedings since December 3 was occasioned by the action of the plaintiff. So long as there is no unreasonable delay in the administrative proceedings, resulting from the acts of those conducting the proceedings, plaintiff may not invoke the jurisdiction of this Court to obtain relief from the type of order involved herein.

The Motion of the Postmaster General to Dismiss is, therefore, SUSTAINED on the ground that the plaintiff's action is premature.

Order in conformity with the foregoing views is entered.

/s/ EUGENE RICE
Judge.

Barel v. Fiske.

U. S. Dist. Ct., S. D. N. Y., March 1, 1954.

SUGARMAN, D. J. Plaintiff seeks a temporary injunction restraining the Postmaster of Mount Vernon Station, New York, from continuing to impound mail addressed to Gem Company in Mount Vernon.

It appears that after an investigation conducted by postal inspectors, the Postmaster of Mount Vernon was "instructed" by one of said inspectors on January 29, 1954, to withhold Gem Company's mail pursuant to 39 C. F. R. 36.10.

On February 16, 1954, after further investigation by the postal authorities, the Gem Company was served with a complaint directing it to show cause at a hearing to be held on March 5, 1954, pursuant to 39 C. F. R. 151.1, *et seq.*, why it should not be debarred from the receipt of mail. The defendant herein was, on February 18, 1954, ordered to continue to impound Gem Company's mail pending termination of that administrative hearing. Thus, defendant has withheld plaintiff's mail since January 29, 1954.

The record discloses that there is sufficient evidence to sustain the preliminary administrative conclusion that the mails are being here used unlawfully (18 U. S. C., §1341) by a person using a fictitious name. (18 U. S. C., §1342.)

Gem Company has not yet been satisfactorily identified. In the course of plaintiff's attempt to identify himself with Gem Company, he conceded that while he nominally owned Gem Company, that business was "controlled by Chelli Promotions, President Nat Sokol . . ." Plaintiff's

contradictory statements as to the identity of Gem Company justified the Postmaster General's conclusion of failure "to appear and be identified" as required by the statute. (39 U. S. C., §255.) Until compliance with the statutory mandate of appearance and identification the continued impounding of Gem Company's mail was justified on that basis alone and was not an abuse of administrative authority.

However, assuming *arguendo* that plaintiff Barel has sufficiently identified himself with Gem Company as he claims, the Postmaster General has the authority to impound suspect mail matter pending decision of the question whether the mails are being used unlawfully. Pink Williams v. Petty (D. C. E. D., Okla.), Civ. 3655, Decision of Judge Rice, not yet reported. Of course this refusal to deliver a person's mail must be based upon substantial evidence to sustain preliminary administrative finding that there is a fraudulent scheme operating through the postal facilities. I cannot say that the evidence on which the postal authorities acted in the instant case is insufficient as a matter of law to justify their findings. Nor does it appear that the hearing has been noticed for an unreasonably late date. (*Cf.*, Donnell Mfg. Co. v. Wyman, 156 Fed. 415.)

Accordingly, the motion for a temporary injunction is denied.